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19-P-1215

Appeals Court

COMMONWEALTH vs. AMY S. DAIGLE.

No. 19-P-1215.

Essex. September 15, 2020. - January 25, 2021.

Present: Vuono, Sullivan, & Englander, JJ.

Motor Vehicle, Operating under the influence. Evidence,  
Breathalyzer test, Scientific test.

Complaint received and sworn to in the Newburyport Division of the District Court Department on November 13, 2017.

The case was tried before Allen G. Swan, J.

Michael A. Contant for the defendant.  
Emily R. Mello, Assistant District Attorney, for the Commonwealth.

SULLIVAN, J. After a jury trial, the defendant, Amy S. Daigle, was convicted of operating a motor vehicle while under the influence of alcohol (OUI). See G. L. c. 90, § 24 (1) (a) (1).<sup>1</sup> This appeal calls upon us to decide what

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<sup>1</sup> She pleaded guilty to the second offense portion of the charge. The judge found her not responsible for a marked lanes

foundation must be laid before the Commonwealth may introduce evidence of a breath test result that was recorded by the breathalyzer machine as a refusal. We conclude that before evidence is admitted to show that the breath test did not register an adequate breath sample, the Commonwealth must comply with the applicable statutes and regulations governing the admissibility of breath test results. See G. L. c. 90, § 24K; 501 Code Mass. Regs. §§ 2.00 (2016). That is, the Commonwealth must show, at a minimum, that the person administering the test is a certified operator and that the breathalyzer machine is functioning properly in the manner contemplated by the statute and regulations.<sup>2</sup> No such showing was made in this case. We therefore vacate the judgment and set aside the verdict.

Background. The jury could have found the following facts. On the evening of November 12, 2017, the defendant, while driving, failed to stop at a stop sign on Sunset Drive in Newbury. Officer Daniel Jenkins observed the infraction and stopped the defendant's car. When he reached the car, Jenkins smelled alcohol and noticed that the defendant's eyes were

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violation but found her responsible for a civil violation of failure to stop for a stop sign.

<sup>2</sup> In the rare case where the defendant is the proponent of the evidence, the Commonwealth must comply with its discovery obligations, and the defendant must submit evidence in a form that comports with the statute and regulations.

glassy. She slurred her words in response to Jenkins's questions and admitted to having two glasses of wine at a restaurant.<sup>3</sup> At Jenkins's request, the defendant got out of the car to perform field sobriety tests. She told the officer that she had two knee surgeries ten to twenty years earlier, but stated she could perform the field sobriety tests and agreed to do so. She did not perform the first field sobriety test to the officer's satisfaction and failed the second. That is, for the first test, she left approximately six inches of space between her feet on the nine-step walk and turn test, and stepped off the white line by one or two inches multiple times. She removed her high heeled boots (at Jenkins's suggestion) before attempting to perform the second test, the one-legged stand test, but was unable to perform it. Jenkins stopped the second test.

Jenkins determined that the defendant was intoxicated and arrested her. Another officer arrived to assist. After she was handcuffed with her hands behind her back, the defendant became very upset, yelled, and told the officers that she had been the victim of a crime in the past. The officers then handcuffed her with her hands in front of her body and put her in the cruiser.

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<sup>3</sup> The moon roof of the defendant's car was open on a cold night, which the Commonwealth argued was an indication of inebriation. The defendant testified she opened the moon roof because she had a hot flash.

While in the cruiser she said her mouth was dry and licked her lips repeatedly. The second officer on the scene also noted that she smelled of alcohol.

At the police station, Jenkins asked the defendant if she would take a breath test, and the defendant agreed. The test was administered by Jenkins. No one else observed it. Jenkins instructed the defendant to blow into the breathalyzer machine by making a firm seal with her lips and exhaling when told to do so. During the test Officer Jenkins watched the breathalyzer machine; he only occasionally glanced at the defendant and did not offer any testimony as to what he saw when he did. The defendant attempted to perform the test three times. After three attempts, no breath sample registered on the breathalyzer machine.

The defendant asked several times to take the test again, but as Jenkins explained at trial, after three attempts the breathalyzer machine resets. He did not administer a second test. Upon learning that she could not take the test again, the defendant became upset and agitated, a fact which the Commonwealth attributed to inebriation, and which the defendant testified was due to the fact that she was anxious, suffered from posttraumatic stress disorder (PTSD) as a result of her trauma, had suffered a panic attack when she was handcuffed and arrested, and wanted to take the test again.

The admissibility of the breath test evidence was hotly contested at trial. As the judge observed, at the time of the trial, "the DA's Office is -- most of the DA's Offices throughout the state are not offering them --." On the day of trial the Commonwealth, having received notice that the defendant intended to call her treating social worker to explain the symptoms of PTSD and the impact of that disorder on the day of her arrest, filed a motion in limine to introduce evidence that the defendant consented to the breath test and ultimately failed to properly complete the test, to which the defendant objected. The defendant also moved to bar the breath test reading, and to continue the case in order to conduct discovery. During the course of the hearing the Commonwealth maintained that it was entitled to introduce both the consent form and the inadequate sample result from the breathalyzer.<sup>4</sup> The judge

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<sup>4</sup> During the hearing on the parties' motions in limine, the prosecutor represented that the Commonwealth currently was not introducing breath test results not because of the inaccuracy of the test, but because of then-pending litigation regarding discovery violations by the Commonwealth's office of alcohol testing. Given these circumstances, defense counsel stated that he was not on notice that the Commonwealth would introduce breath test evidence and asked to exclude the breathalyzer test result. He questioned the accuracy of the tests and sought a continuance to obtain discovery concerning the machine in question, a machine which defense counsel represented had a high number of refusals.

allowed the Commonwealth's motion, and denied the defendant's request to exclude the breathalyzer reading.

At trial, Jenkins was not qualified as a certified operator. The accuracy of the breathalyzer was contested, as was the adequacy of compliance with statutory and regulatory mandates, but there was no testimony regarding the breathalyzer, how it worked, or whether it properly registered air intake. Over the defendant's renewed objection,<sup>5</sup> Jenkins testified that the defendant failed to provide a sample "[b]ecause when someone actually gives a sufficient sample, the machine indicates so. And it did not." Later, the officer further explained that "after three attempts, the machine basically just -- it kind of like resets. And after three attempts, it's basically -- you know, it turns into a refusal." The defendant again objected

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<sup>5</sup> At trial defense counsel renewed his objections stating, "Judge, I don't think there's any evidence -- there's any indication that there's even a keeper of the record, let alone someone that knows the machine -- how it works, the inner workings on the machine. There's no indication that this person has any basis of knowledge for [testifying there was no breath sample]. He's going into the -- if that's the case, I want to be able to go into the accuracy of the machine, because he's speaking to the fact that he could tell that there was an insufficient sample from what the machine registered, when in fact that's not -- that's not the question here. The question is whether she consented and made an attempt to blow into the machine. He would have to witness that, not able to tell that just from looking at a screen." The judge said, "Well, he testified that he learns this from what the screen shows," to which defense counsel responded, "But if the machine's not working properly, there is no way to determine that. If he's not looking at her."

and moved to strike. The judge struck the reference to a "refusal" and instructed the jury to disregard it, but the remainder of the testimony stood.

Discussion. When a defendant has consented to a breath test, evidence that she has failed to provide a sufficient sample may be introduced, in appropriate circumstances, to show that she is incapable of or has attempted to avoid giving a sample. See Commonwealth v. AdonSoto, 475 Mass. 497, 501-502 (2016); Commonwealth v. Curley, 78 Mass. App, Ct. 163, 168 (2010). See generally G. L. c. 90, § 24K; 501 Code Mass. Regs. §§ 2.01, 2.07, 2.09, 2.12, 2.14 (2016); Commonwealth v. Camblin, 471 Mass. 639, 649 (2015), S.C., 478 Mass. 469 (2017). Here, the sole evidence of a failure or refusal to perform the breath test was the reading from the breathalyzer itself.

"[T]he relevant statutes condition the evidentiary admission of breath test results on satisfaction of certain requirements. Of relevance here is the requirement that a certified operator perform the breath test 'using infrared breath-testing devices' according to methods approved by the Secretary of Public Safety (Secretary) in accordance with regulations promulgated by the Secretary. G. L. c. 90, § 24K." Camblin, 471 Mass. at 645. The evidence offered in this case failed to meet the statutory and regulatory requirements in at least two respects -- that the person administering the test was

certified, and that the methodology used was in fact reliable. See generally G. L. c. 90, § 24K; 501 Code Mass. Regs. §§ 2.01, 2.02, 2.07, 2.13, 2.14 (2016); Camblin, supra at 645-646. There was no evidence of the officer's background and training regarding the breathalyzer, and it was error to admit the testimony over objection without first making a judicial determination that the officer was a certified breath test operator. See generally G. L. c. 90, § 24K; 501 Code Mass. Regs. § 2.07. Nor was there evidence that the breathalyzer machine was operating properly, that is, that it could accurately detect the breath of a test subject. There was no evidence that the equipment was certified, or that it had undergone periodic testing. See 501 Code Mass. Regs. §§ 2.06, 2.12 (2016).

The Commonwealth maintains that the fact that "the officer's observations were made from the instrument itself is of no import." However, absent a proper showing that the machine was functioning properly and the officer had the qualifications to operate it, the officer's testimony that there was no breath sample because the "machine indicates so" was "merely an opinion, ipse dixit." Peterson v. Foley, 77 Mass. App. Ct. 348, 354 (2010). The failure to register a reading is

itself a result, and that result is not admissible unless the statutory standards are met.<sup>6</sup>

The Commonwealth characterized this case both at trial and on appeal as a Curley case, a characterization that the judge accepted. This case is unlike both Curley and AdonSoto. AdonSoto and Curley reiterate that refusal evidence is testimonial and therefore inadmissible. See Commonwealth v.

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<sup>6</sup> Because an insufficient sample reading is a breath test result, the defendant was entitled to discovery regarding the accuracy of the reading and the reliability of the breathalyzer machine. As far as we can tell on this record, the Commonwealth did not provide the breath test result in automatic discovery; the defendant did not have the "BT ticket." When the Commonwealth moved on the day of trial to admit the consent form and the test results, not just in rebuttal to the defendant's expert witness (whose testimony the defendant offered to withdraw), but in the Commonwealth's case-in-chief, this constituted a material change in the Commonwealth's position with respect to the admission of breath test results in OUI cases. The defendant objected, claiming, among other things, that the accuracy of the breathalyzer machine was also at issue in pending litigation, and asserted that the machine used in this instance "has an unusual amount of refusals based on insufficient air sample." Defense counsel further explained that he would have asked for additional discovery on the machine itself had he been aware of the Commonwealth's intention to rely on the results of the breathalyzer test to show the defendant had "refused" to submit a sufficient breath sample. The prosecutor maintained that the defendant had proffered her treating social worker as an expert to explain why there was an insufficient sample, and that the defendant should have known that the reading would be admitted in a "Curley[] case." The judge allowed the Commonwealth's motion and admitted what he described as "Curley evidence." Both the prosecutor's motion and the judge's ruling were premised on the misapprehension that an insufficient sample reading was not a breath test result. Because it was, the defendant was entitled to the same discovery as she would have had in any other OUI case in which a breath test result was admitted.

Lopes, 459 Mass. 165, 170 (2011); Opinion of the Justices, 412 Mass. 1201, 1211 (1992). However, once consent to a breath test has been given, the failure to produce a breath sample is not improper refusal evidence. Rather, in the proper circumstances, the failure to provide a breath sample may be introduced either to show that the defendant is too impaired to take the test or to show consciousness of guilt. See AdonSoto, 475 Mass. at 501-502; Curley, 78 Mass. App. Ct. at 168.<sup>7</sup> Neither case stands for the proposition that evidence of an inadequate breath sample may be admitted when the statutory and regulatory prerequisites regarding admissibility of breath test results have not been met.

Because the evidence of an insufficient breath sample was admitted in error, and the objection was preserved, we review to determine whether the "error was 'prejudicial' or 'harmless.'" Commonwealth v. Adams, 485 Mass. 663, 669 n.11 (2020), citing Commonwealth v. Vinnie, 428 Mass. 161, 163, cert. denied, 525 U.S. 1007 (1998); Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994). The evidence in this case was sufficient to support a

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<sup>7</sup> No challenge to the reliability or admissibility of the breath test result itself is evident from the opinions in either Curley or AdonSoto. In addition, in each case a police officer testified that he had watched the defendant take the test and that the defendant did not follow the instructions to make a tight seal around the mouthpiece, thus permitting the inference that the defendant either was grossly impaired or intended to game the test by giving an incomplete sample.

conviction, but was not so overwhelming as to be harmless where, as here, the defendant mounted a vigorous defense. She introduced medical records documenting three prior knee surgeries, and claimed that her poor performance on the field sobriety tests was attributable to her knee problems. Her treating social worker testified that she suffered from PTSD, flashbacks, and associated conditions that caused the defendant to hyperventilate. The social worker explained that a person who was hyperventilating would be unable to get sufficient air into the lungs. The defendant testified that once handcuffed she had a panic attack (due to the previous assault) and was hyperventilating, and that her mouth was dry. The challenged evidence went to the heart of the defense.

The jury also focused on the breath test reading, and the reasons for it. During its deliberations, the jury sent the following questions pertaining to the breath test evidence to the judge:

"Why didn't the officer repeat the breathalyzer [sic] test one additional time? Can we see the transcript?"

"Are there statistics related to people's inability to push air into the breathalyzer [sic] machine?"

These questions suggest that the jury closely considered why no breath sample was detected.

In these circumstances we "'cannot say with fair assurance' that 'the error did not influence the jury, or had but very

slight effect'" (citation omitted). Commonwealth v. Parent, 465 Mass. 395, 402 (2013). Accordingly, we vacate the judgment and set aside the verdict.<sup>8</sup>

So ordered.

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<sup>8</sup> In view of our disposition, we find it unnecessary to reach the defendant's alternative grounds of appeal.